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12
13 **UNITED STATES DISTRICT COURT**
14 **DISTRICT OF NEVADA**

15
16 SWITCH, LTD., a Nevada limited liability
company,

17
18 Plaintiff,

19 vs.

20 STEPHEN FAIRFAX; MTECHNOLOGY;
and DOES 1 through 10; ROE ENTITIES 11
21 through 20, inclusive,

22 Defendants.

Case No. 2:17-cv-02651-GMN-EJY

**JONES LANGE LASALLE, INC.’S
OPPOSITION TO PLAINTIFF SWITCH,
LTD.’S MOTION TO COMPEL THIRD
PARTY JONES LANG LASALLE TO
PROVIDE REQUESTED DOCUMENTS**

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1 **I. INTRODUCTION**

2 While non-Party Jones Lange LaSalle, Inc. (“JLL Inc.”) understands that discovery, in
3 general, is permissible for relevant information, this Motion to Compel should be denied. Rule 45
4 and Rule 26 impose limitations to prevent discovery for improper purposes or which is not
5 proportional to the needs of the case. And the discovery requested from JLL Inc., which is distantly
6 connected to this case only because it offers professional real estate services—not data center
7 technical design services—to *another* third party (Aligned Data Centers), is not being sought for a
8 proper purpose and is not justified by the facts at issue in this case.

9 Plaintiff Switch, Ltd.’s (“Switch”) admitted purpose in issuing the subpoena is to exploit the
10 discovery process to develop new claims against third parties under the guise of a trade secret claim
11 that has nothing to do with JLL Inc., which has never even had professional relationship with the
12 Defendants. This point was made best by counsel for Mr. Fairfax, who revealed that Switch’s
13 counsel “said on two separate occasions that Switch needed discovery in this case to ‘substantiate’
14 its ‘anticipated claims’ [] against Aligned.” ECF No. 48, at 4. And it was confirmed again during
15 the meet and confer process where counsel for Switch admitted that it was seeking to develop
16 claims for “contributory patent infringement” related to a now-dismissed patent lawsuit between the
17 parties. Indeed, this dispute does not exist in a vacuum and this confirms it is part of what appears
18 to be a long-running campaign by Switch to access competitor information and disrupt competition
19 in the market for data center contracts.

20 Nor does Switch’s speculation that it could possibly find relevant information in JLL Inc.’s
21 files excuse its improper purpose, especially where there are no facts suggesting that discovery from
22 JLL Inc. is proportional to the needs of the case, and where Switch has failed to show that it has
23 been unable to obtain necessary discovery from Defendants over the two-plus years this case has
24 been pending. As discussed below, Switch’s trade secret claim appears to be questionable, at
25 best. But even if it does have a claim, vague allegation about trade secrets arising out of a 2011
26 and/or 2015 tour of a facility by Defendants provides Switch with zero basis to seek access to
27 highly confidential current business information about third party JLL Inc.’s customer
28 relationships. These customers include JLL Inc.’s longstanding clients relationships that pre-date

the allegations in this case (eBay and PayPal), clients that have business connections to both JLL Inc. and Switch (eBay, PayPal, and Uber), and clients that compete directly with Switch (Aligned and its related corporations). These issues are compounded because this current competitor and customer confidential information would be put in the hands of in-house “policy” personnel at Switch with direct involvement in the negotiation of commercial contracts.

For all these reasons, and also for the additional reason that Switch failed to correct its Subpoena to name the proper party or to designate the proper place of compliance for JLL, Inc. as an Illinois-based corporation, the Motion to Compel should be denied.

II. BACKGROUND

A. Switch’s 2017 Patent Lawsuit Against MTechnology and Aligned Data Centers

In August 2017, Switch filed a lawsuit in the Eastern District of Texas asserting claims for patent infringement against defendants MTechnology, Inc. (“MTechnology”) and Aligned Data Centers, LLC (“Aligned”). Declaration of Michael Berta (“Berta Decl.”), **Exh. A**, Plaintiff’s Complaint for Patent Infringement in Case No. 2:17-cv-00574 (E.D. Tex.) (the “Patent Action”).

There, Switch alleged that MTechnology’s President Stephen Fairfax was “given wide access to Switch’s data center facility in 2011 and in early 2015.” *Id.* ¶ 2. Apparently, this “wide access” was a tour and inspection of the facility and “several hours” conversing with Switch’s CEO. *Id.* ¶ 3. Switch further claimed that in 2013, Aligned hired Fairfax/MTechnology, who then assisted Aligned with deploying “technology” in its data centers that allegedly “mirrors” Switch’s. *Id.* ¶ 5. Based on these allegations, Switch asserted that the defendants had infringed three patents:

- U.S. Patent No. 8,072,780 (“Integrated Wiring System and Thermal Shield Support Apparatus for a Data Center”), issued on December 6, 2011;
- U.S. Patent No. 8,180,495 (“Air Handling Control System for a Data Center”), issued on May 15, 2012; and,
- U.S. Patent No. 9,622,389 (“Electronic Equipment Data Center and Server Co-Location Facility Configurations and Method of Using the Same”), issued on April 11, 2017.

1 Apparently, Switch’s belief that Fairfax “encouraged” Aligned to use Switch’s patented
 2 technology was based solely on perceived similarities in the design of Aligned’s data centers that
 3 Switch claimed to discern from publicly available materials, such as photos and videos on
 4 Aligned’s website. *Id.* ¶ 53.

5 On August 16, 2017, Aligned filed counterclaims against Switch, seeking to invalidate
 6 Switch’s patents and asserting separate claims for violations of the Lanham Act, tortious
 7 interference, and business disparagement. Berta Decl., **Exh. B** (Aligned’s Answer and
 8 Counterclaims in the Patent Action). These claims were based in part on Aligned’s allegation that
 9 Switch had, in effect, admitted—in a letter sent days before the lawsuit was filed—that its
 10 infringement claim was baseless, yet at the same time was in the marketplace telling Aligned’s
 11 customers that Aligned did in fact infringe Switch’s patents. *Id.* ¶¶ 21-28. Aligned also set forth
 12 detailed allegations rebutting Switch’s vague claims that it had discerned similarities between the
 13 data centers. *Id.* ¶¶ 41-44. On July 9, 2018, pursuant to the parties’ joint motion, all of the claims
 14 and counterclaims were dismissed with prejudice. Berta Decl., **Exh. C** (Joint Motion to Dismiss).

15 **B. The Present Case: Switch’s Trade Secret Lawsuit Against** 16 **Fairfax/MTechnology**

17 On September 15, 2017, just weeks after filing the Patent Action, Switch initiated the
 18 present case by filing a Complaint against Defendants MTechnology and its President Stephen
 19 Fairfax in Clark County District Court. Switch did not provide notice of its action to the
 20 Defendants, and thus obtained a temporary restraining order (“TRO”), but Switch’s ill-gotten order
 21 was vacated when, in October 2017, Defendants removed the case to this Court. ECF No. 1.

22 In contrast to the Patent Action, in which Switch was represented by outside counsel, in the
 23 present case, Switch is represented only by its own in-house counsel, Sam Castor, who is its
 24 “Executive Vice President of Policy.” Berta Decl., **Exh. D** (Castor’s LinkedIn profile). By Mr.
 25 Castor’s own admission, he has a wide-ranging role at Switch that is not limited to handling
 26 litigation matters. Rather, he “assists Switch in all things legal, including energy sustainability,
 27 contract negotiation, intellectual property litigation and prosecution, protection and licensing,
 28 telecom, power and air quality regulatory compliance, human resource policy, strategy, legislative

1 policy, complete commercial transactions, and litigation.” *Id.* He claims to have “negotiated
2 several hundreds of telecom, power, and colocation deals and multi-million a month contracts with
3 Fortune 100 companies.” *Id.*

4 Though the legal claims are different, the factual allegations in this action rest on the same
5 transactions as the Patent Action; that is, Fairfax’s same “technical audit of Switch’s data center
6 facilities in 2011 and again in early 2015.” ECF No. 1 (“Nature of the Action”). These two visits to
7 Switch’s data center were apparently at the behest of Switch’s customer, eBay. *Id.*, Ex. 2.
8 Although Switch makes the conclusory allegation that Fairfax provided confidential information to
9 Switch’s “director competitors, Aligned and Inertech,” Switch did not file any trade secret claims or
10 seek a TRO without notice against those third parties. *Id.* And, again, the only support for its
11 assertion about those parties was Switch’s claimed identification of similarities in data center
12 designs based on pictures and videos publicly posted on Aligned’s website—rather than any direct
13 evidence that Fairfax or MTechnology actually provided some specific information to Inertech or
14 Aligned.

15 Since this lawsuit was filed in 2017, little to nothing has happened. According to the docket
16 in this case, in September 2019 (around two years after the suit was first filed), Defendants filed a
17 Request for a Pretrial Conference and Submission of Protective Order, in which they expressed
18 “concerns regarding Switch’s use of documents obtained in discovery” because “the majority of the
19 documents Plaintiff Switch is requesting in this litigation are sensitive documents containing the
20 trade secrets and detailed design information of [Switch’s] biggest competitors.” Berta Decl., **Exh.**
21 **E** at 2. Fairfax explained that these concerns were based on explicit statements by Switch:

22 Switch has already informed Plaintiffs and their counsel that it intends to use discovery in
23 this case for the improper purpose of “patent litigation” against at least one of those
24 competitors. The rest of the information about other competitors appears to be an attempt to
use the discovery process in lieu of industrial espionage.

25 *Id.* In support, counsel for Fairfax submitted a Declaration averring that Switch’s in-house counsel
26 Sam Castor had “said on two separate occasions that Switch needed discovery in this case to
27 ‘substantiate’ its anticipated claims against Aligned Data Centers, one of Switch’s primary
28 competitors.” Berta Decl., **Exh. F**, ¶ 6. Further, counsel for Fairfax stated that Mr. Castor had

attempted to justify this by misrepresenting that the Patent Action against Aligned Data Centers had been dismissed without prejudice, when in fact it had been dismissed with prejudice. *Id.*, ¶ 7.

C. Third Party Jones Lang LaSalle

JLL Inc. is a professional services firm that specializes in real estate and investment management, organized under the laws of Maryland and Illinois, with its headquarters in Chicago, Illinois. Declaration of Helen Arnold (“Arnold Decl.”), ¶ 3. JLL Inc. is the parent company of Jones Lange LaSalle Americas, Inc. (“JLL Americas”) (collectively with JLL, Inc., “JLL”). *Id.* at ¶ 5. JLL Americas is a corporation organized under the laws of Maryland, with its headquarters in Chicago, Illinois. *Id.* at ¶ 6. JLL Americas is registered as a foreign corporation in Nevada, with three offices in the state (two in the Las Vegas area and one in Reno), and has employees that are located there. *Id.* at ¶ 7. Unlike its subsidiary, JLL Inc. is not registered to do business in Nevada as a foreign corporation and has no offices or employees in Nevada. *Id.* at ¶ 4.

D. The Subpoena and Motion to Compel

On July 19, 2019, Switch served the subpoena on JLL Inc., from which this Motion arises (the “Subpoena”). Pursuant to the agreement of the parties, JLL Inc. served objections on Switch on September 19, 2019. Berta Decl., **Exh. G** (JLL Inc.’s Objections and Responses to Subpoena). Among JLL Inc.’s objections were: (1) that the Subpoena was served for an improper purposes; (2) that it sought irrelevant information and was overburdensome; (3) that it sought information that Switch should have sought from parties to the action; and, (4) that it called for the production of confidential and trade secret information.

In October and November 2019, JLL Inc. and Switch met and conferred, and JLL Inc. explained the bases of its objections in more detail—in a process that ***counsel for Switch has now misrepresented in his Declaration***. Specifically, Mr. Castor states, accurately, that on October 30, 2019, he sent an email to follow up on the parties’ telephonic meet and confer. ECF No. 66-1 (Castor Decl., ¶ 21). However, Mr. Castor then declares, falsely, that “JLL did not respond” (*Id.* ¶ 27), and in support of that attaches Exhibit 10, which ends with a November 4, 2019 email from Mr. Castor to counsel for JLL Inc. asking for a response. Mr. Castor omits from this Exhibit 10—and his Declaration entirely—that at 3:47pm on November 4, 2019, in direct response to this same

1 email chain, counsel for JLL Inc. sent him a lengthy email in response. Berta Decl., ¶ 10, **Exh. H**.
 2 Mr. Castor’s statement that “JLL did not respond” is therefore false.

3 In that concealed November 4, 2019 email, counsel for JLL Inc. reiterated to Mr. Castor
 4 what it had told him on the phone—that JLL Inc. had a number of objections and was particularly
 5 concerned about Switch’s expressly-stated improper purpose for issuing the subpoena, as reflected
 6 in Fairfax’s filings and the Declaration of its counsel, discussed above. Berta Decl., ¶ 10. In fact,
 7 during that phone call, Mr. Castor confirmed that the purpose of the discovery was to develop
 8 evidence to determine if JLL Inc. was liable for “contributory patent infringement.” *Id.*, ¶ 9. JLL
 9 Inc. was expecting a response from Switch to address the substance of its objections and/or a
 10 proposal to narrow the document requests in the subpoena. It never received one. *Id.*, ¶ 11. In fact,
 11 following that exchange, *Switch* ceased all communications with JLL Inc. on the matter for over
 12 four months. *Id.*

13 Then, without warning, after close of business on March 13, 2020, Switch sent JLL Inc. a
 14 terse email with a draft of this Motion stating that it would be filing the Motion the coming
 15 Wednesday.¹ On March 18, 2020, counsel for JLL Inc. sent a letter to Switch explaining that
 16 Switch had failed to respond to JLL Inc.’s last communication and request to substantiate its
 17 Subpoena or to narrow the scope of the requests. Berta Decl., **Exh. I**. JLL Inc. invited Switch to do
 18 so again at that time. *Id.* In response, Switch again offered a take-it or leave-it deal: produce all
 19 documents requested by the Subpoena or it would file the Motion. *Id.*, **Exh. J**.

20 Finally, during the parties’ efforts to meet and confer about this Motion, JLL Inc. advised
 21 Switch that the Subpoena had improperly designated Nevada as the location for compliance, which
 22 violates Fed. R. Civ. P. 45(c)(2)(A) due to JLL Inc.’s location in Chicago, Illinois. *Id.*, **Exh. I**. In
 23 response, Switch claimed to have “sufficient evidence of JLL Inc.’s activity in Nevada” and
 24 proceeded to file this Motion in Nevada. *Id.*, **Exh. J**. It is now clear that the evidence Switch
 25

26 ¹ Switch’s Motion *again* misrepresents facts about the meet and confer where it states that “Switch
 27 has also provided a copy of this Motion to JLL on February 12, 2020.” Mot. at 5:1. In reality,
 28 Switch did not provide a draft until March 13, 2020. JLL *expressly alerted* Switch to this false
 statement in the draft Motion in JLL’s Letter of March 18, 2020, but Switch still failed to correct it
 before filing the Motion. Berta Decl., **Exh. I**.

1 claimed to have of JLL Inc.’s business activity in Nevada amounted only to screenshots from JLL’s
2 website showing the address of offices that JLL Americas maintained in Nevada.

3 **III. ARGUMENT**

4 **A. The Subpoena Violates Rules 45 and 26 Because It Seeks To Use the Discovery** 5 **Process for the Improper Purpose of Developing New Claims Against Third** 6 **Parties.**

7 There is direct evidence that Switch served the Subpoena on JLL Inc. for the purpose of
8 developing claims against at least JLL and Aligned. This alone provides a sufficient basis to deny
9 Switch’s Motion to Compel.

10 Under both Rule 45 and Rule 26, the “scope of discovery” is limited to matters “relevant to
11 any party’s claim or defense” and must be “proportional to the needs of the case.” Fed. R. Civ. P.
12 26(b)(1); *Ademiluyi v. Phillips*, No. 2:14-cv-00507-MMD, 2014 WL 7012493, at *2 (D. Nev. Dec.
13 12, 2014). The Advisory Committee has expressly stated that this rule was crafted so that discovery
14 would be limited to the claims identified in the pleadings: “The rule change [for Fed. R. Civ. P.
15 26(b)(1)] signals to the court that it has the authority to confine discovery to the claims and defenses
16 asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to
17 develop new claims or defenses that are not already identified in the pleadings.” Fed. R. Civ. P.
18 26(b)(1) advisory committee’s note—2000 amendment; *Ademiluyi*, 2014 WL 7012493, at *3 (“In
19 further clarifying this rule, the Advisory Committee has declared that it ‘intends . . . the parties and
20 the court [to] focus on the actual claims and defenses involved in the action’”); *Monte H.*
21 *Greenawalt Revocable Tr. v. Brown*, No. 2:12-cv-01983-LRH, 2013 WL 6844760, at *3 (D. Nev.
22 Dec. 19, 2013) (“The Advisory Committee Notes to the 2000 Amendments to Rule 26(b)(1)
23 explain, ‘the parties have no entitlement to discovery to develop new claims or defenses that are not
24 already identified in the pleadings.’ This prevents litigants from engaging in ‘fishing expeditions’
25 that may expose the defendant to claims not previously asserted in the plaintiff’s complaint.”); *see*
26 *also Dominguez v. Corp. of Gonzaga Univ. (Gonzaga Univ.)*, No. 2:17-cv-00286-SAB, 2018 WL
27 3338181, at *2 (E.D. Wash. Apr. 19, 2018) (“[I]t is improper to use discovery in search of a factual
28 predicate to support a future complaint.”) (citing *Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d
1318, 1327 (Fed. Cir. 1990) (“The discovery rules are designed to assist a party to prove a claim it

1 reasonably believes to be viable without discovery, not to find out if it has any basis for a claim.”
2 (emphasis omitted)).

3 Following these principles, Courts in this district and Circuit have refused to enforce
4 subpoenas where the discovery sought was for the purpose of developing new claims against non-
5 parties. *Ademiluyi*, 2014 WL 7012493, at *3 (denying motion to compel compliance with subpoena
6 where “none of plaintiff’s causes of action are connected to Plaintiff’s assertions against [the
7 subpoenaed party]” and there were “other far less burdensome, less intrusive, and more convenient
8 methods are available to Plaintiff to obtain the information she seeks in support of her claims in her
9 amended complaint.”); *Greenawalt*, 2013 WL 6844760, at *3-4 (granting protective order
10 preventing discovery of financial records of third parties because Plaintiff’s bare “suspicion” that
11 the third parties may have “unlawfully” withdrawn funds from a trust had no bearing on his actual
12 asserted claims for breach of contract and an accounting against the trust); *Dominguez*, 2018 WL
13 3338181, at *2 (granting motion to quash subpoena on basis that it was “improper for Plaintiff to
14 use discovery to uncover alleged evidence of bad faith where there is no objective basis to support
15 such allegations.”); *Beaver Cty. Employees’ Ret. Fund v. Tile Shop Holdings, Inc.*, No. 16-mc-
16 80076-JSC, 2016 WL 7212308, at *4 (N.D. Cal. Dec. 13, 2016) (granting sanctions following
17 denial of motion to compel enforcement with subpoena that was an “attempt to fish around to see if
18 there was a basis to bring a libel case against [third party]” because it was issued “for an improper
19 purpose”).

20 In this case, Switch has openly admitted that its purpose in issuing the Subpoena was to
21 develop possible claims against JLL Inc. and other third parties named in the Subpoena. Counsel
22 for Fairfax has submitted a sworn declaration confirming that Switch’s in-house counsel Sam
23 Castor “said on two separate occasions that Switch needed discovery in this case to ‘substantiate’ its
24 anticipated claims against Aligned Data Centers, one of Switch’s primary competitors.” Berta
25 Decl., **Exh. F**, ¶6. Doubling down, during the meet and confer process for this Motion, Mr. Castor
26 again stated to JLL Inc. that the purpose of the subpoena was to develop evidence of “contributory
27 patent infringement.” Berta Decl. ¶ 9. This blatant effort to identify *only new third parties* to sue
28 for patent infringement is especially improper here, where Switch knows that it could not possibly

1 add claims for patent infringement against the Defendants in this action (Fairfax and MTechnology)
 2 because it *already sued them* for patent infringement and dismissed those claims with *prejudice*.
 3 Switch’s subpoena is therefore a direct violation of the discovery rules and its Motion to Compel
 4 should be denied on that basis alone.

5 **B. The Subpoena Violates Rules 45 and 26 Because It Imposes an Undue Burden**
 6 **on JLL By Seeking Information That Is Not Proportional to the Needs of the**
 7 **Case.**

8 Faced with clear evidence of its improper purpose, Switch attempts to salvage the Subpoena
 9 by claiming that it “is not *merely* using the current action to build a future case against JLL”
 10 because it also “believes that JLL has information relevant to the current case.” Mot. at 8:25-27
 11 (emphasis added). But Switch fails to show any factual or evidentiary basis for that “belief” other
 12 than pure speculation about information JLL might theoretically have because it has customers and
 13 connections in the data center industry. Such unsupported conjecture does not meet Rule 26’s
 14 requirements of proportionality in discovery, and imposes an undue burden on JLL Inc. as a third
 15 party to this action.

16 By definition, issuing a subpoena seeking irrelevant information imposes an undue burden.
 17 *Greenawalt*, 2013 WL 6844760, at *3 (“Discovery requests seeking irrelevant information are
 18 inherently undue and burdensome.”) (citing *Compaq Computer Corp. v. Packard Bell Elecs.*
 19 *Inc.*, 163 F.R.D. 329, 335–36 (N.D. Cal. 1995) (“Obviously, if the sought-after documents are not
 20 relevant nor calculated to lead to the discovery of admissible evidence, then any burden whatsoever
 21 imposed upon [the non-party] would be by definition ‘undue.’”) (emphasis omitted)). And,
 22 “[w]hile the scope of relevancy is broader for discovery purposes, discovery permissible from
 23 nonparties is narrower than that permissible from parties to the action.” *FTC v. AMG Servs., Inc.*,
 24 291 F.R.D. 544, 553 (D. Nev. 2013) (citing *Dart Indus. Co. v. Westwood Chem. Co.*, 649 F.2d 646,
 25 649–50 (9th Cir.1980) (broader restrictions on discovery appropriate to protect nonparties)); *Laxalt*
 26 *v. McClatchy*, 116 F.R.D. 455, 458 (D. Nev. 1986) (“The standards for non-party discovery . . .
 27 require a stronger showing of relevance than for simple party discovery.”). Moreover, “[p]ursuant
 28 to the 2015 amendments to Rule 26(b), the relevance of a discovery request is no longer alone
 sufficient to justify requiring a response from the receiving party or person. The discovery must

1 also be proportional to the needs of the case.” *Casun Invest, A.G. v. Ponder*, No. 2:16-cv-2925-
2 JCM-GWF, 2019 WL 2358390, at *5 (D. Nev. June 4, 2019).

3 Switch’s claimed bases for the discovery sought from JLL Inc. shows that the Subpoena is
4 clearly not proportional to the needs of the case. JLL Inc. was not a party to the Patent Action and
5 is not a party to the present action. JLL was not involved in providing data center design services
6 for its client Aligned, has never had a professional relationship with Defendants MTechnology or
7 Stephen Fairfax, and is not aware of any communications with them. Declaration of Mark Bauer
8 (“Bauer Decl.”), ¶¶ 4, 5. While Switch contends that a brochure for Aligned’s data center that
9 contains a quotation from Fairfax is “JLL’s advertising,” that is not accurate. *Id.* Although the
10 brochure lists JLL Americas as a contact for potential data center tenants, the brochure was
11 prepared by Aligned without involvement from JLL. *Id.* As such, it is not evidence of any
12 connection between JLL and Fairfax.

13 Rather, JLL Inc.’s connections to this case are only through JLL Inc.’s customers and
14 clients, who are also third parties in this action:

- 15 ▪ **Aligned Data Centers / Aligned Energy (Request Nos. 6 & 7).** Aligned first became a
16 JLL customer in 2015 (years after the “trade secrets” were first allegedly disclosed to
17 Fairfax), when JLL assisted Aligned with leasing, and then later purchasing, property in
18 Phoenix, Arizona that Aligned intended to use as a data center site. Bauer Decl., ¶ 5.
19 JLL continues to provide Aligned with marketing services related to the Phoenix data
20 center property, as well as other real estate matters. *Id.* However, JLL has never
21 provided services to Aligned related to the design or technical implementation for any
22 Aligned data center. *Id.* Switch alleges only that JLL “helped market” this data
23 center—not that JLL had access to any trade secrets of Switch or helped with its design.
- 24 ▪ **Inertech (Request No. 2).** Switch alleges that Inertech is a subsidiary of Aligned.
25 However, JLL has never done business with Inertech and/or provided real estate services
26 to it in connection with any Inertech data center. Bauer Decl., ¶ 6. Further, JLL is not
27 aware that it has had any communications with Inertech. *Id.*
28

- 1 ▪ **eBay (Request No. 4).** According to Switch’s allegations, eBay retained Fairfax to tour
2 Switch’s facility, and JLL’s National Director Mark Bauer also acted as a broker for
3 Rich Reyher, an engineer at eBay involved with its data centers. In other words, the
4 allegedly relevant connection is only that JLL and Switch have both done business with
5 eBay, which has also done business with Fairfax. However, eBay is a longstanding JLL
6 client, with connections to Mr. Bauer that even predate its relationship with JLL. Bauer
7 Decl., ¶ 7. And neither Mr. Bauer nor JLL were involved in eBay’s use of colocation
8 services offered by Switch. *Id.*
- 9 ▪ **PayPal (Request No. 5).** Switch alleges that PayPal is an Aligned customer at its
10 Phoenix data center and on that basis seeks communications between JLL and PayPal.
11 However, as with eBay, Mr. Bauer and JLL Inc. have a pre-existing relationship with
12 PayPal stemming from Mr. Bauer’s work for eBay. Bauer Decl., ¶ 8. Further, JLL is
13 aware that PayPal uses Switch’s colocation services, and JLL has been involved with
14 those services. *Id.* However, JLL Inc.’s communications with its client PayPal about
15 PayPal’s use of Switch services is confidential to PayPal, and Switch has no legitimate
16 business need for that communication. *Id.* Those communications have nothing to do
17 with the Defendants Fairfax or MTechnology. *Id.*
- 18 ▪ **Uber (Request No. 3).** Uber is an Aligned customer, with facilities at its Phoenix data
19 center, however, JLL was not involved in Uber’s decision to use Aligned’s colocation
20 data center in Phoenix. Bauer Decl., ¶ 9. Further, JLL Inc. is not aware that it has even
21 had any communications with Uber that in any way relate to Defendants MTechnology
22 or Fairfax. *Id.*

23 In sum, Switch has identified only superficial second- and third-degree connections between JLL
24 and Defendant Fairfax and MTechnology (if not more attenuated than that). From there, it leaps
25 straight to the conclusory assertion that “JLL’s connections in the data center industry make it very
26 likely that JLL has information that is relevant to this case.” Mot. at 3.

27 Based on these paper thin connections, Switch has made sweeping document requests for
28 “all communications” between JLL Inc. and these parties that touch on Switch in any way, over a

1 period of time spanning nearly a decade. Such requests do not comply with Rule 26. *Acosta v.*
 2 *Wellfleet Commc'ns, LLC*, No. 2:16-cv-02353-GMN-GWF, 2017 WL 5180425, at *4 (D. Nev. Nov.
 3 8, 2017) (“The fundamental principle of amended Rule 26(b)(1) is ‘that lawyers must size and
 4 shape their discovery requests to the requisites of a case.’ The pretrial process must provide parties
 5 with efficient access to what is needed to prove a claim or defense, but eliminate unnecessary and
 6 wasteful discovery.”). Further, it is well established that the need to tailor discovery requests
 7 proportionally is particularly important in trade secret cases to avoid the misuse of the discovery
 8 process. *Switch Commc'ns Grp. v. Ballard*, No. 2:11-cv-00285-KJD-GWF, 2012 WL 2342929, at
 9 *4 (D. Nev. June 19, 2012) (“If discovery on defendant’s trade secrets were automatically
 10 permitted, lawsuits might regularly be filed as ‘fishing expeditions’ to discover the trade secrets of a
 11 competitor . . .”). Indeed, Switch is familiar with this requirement from that very case, which was
 12 another trade secret misappropriation action filed by Switch,² in which Switch moved to compel
 13 discovery responses, but its motion was denied and it was instead ordered to “provide[] a
 14 description of its alleged trade secrets with reasonable particularity.” *Id.* at *5.

15 Here, Switch has done nothing to proportionally tailor the requests to its trade secret
 16 allegations. For example, Switch sued MTechnology and Aligned in the Patent Action for
 17 infringing patents that issued in 2011 and 2012; therefore, any communication about the public
 18 subject matter of those patents could not pertain to an at-issue “trade secret.” Nor could any
 19 information that *Aligned provided to Fairfax*. As such, the requests by Switch for “all
 20 communications” with Aligned are clearly overbroad on their face and should be denied. *See, e.g.,*
 21 *Casun Invest*, 2019 WL 2358390, at *6 (denying motion to compel compliance with “clearly
 22 overbroad” subpoena requests seeking “all documents pertaining to or regarding in any way”
 23 subject matter because there was “no attempt to limit the requests to nonprivileged documents that
 24 are relevant to the claims or defenses in this action, and which could not otherwise be obtained from
 25 [parties]”); *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637-38 (C.D. Cal. 2005) (denying motion to
 26

27 ² The parties there were Switch Communications Group LLC, and Switch Business Solutions, LLC,
 28 which, upon information and belief, are separate entities affiliated with Switch, Ltd. Switch’s
 current in-house lawyer on this case, Sam Castor, also represented Switch as outside counsel in that
 case.

1 compel that sought “documents related to nonparty KSA’s business relationship with other
 2 nonparties . . . rather than nonparty KSA’s relationship with defendant.”). Further, when confronted
 3 with JLL Inc.’s objections, Switch did nothing to narrow or remedy its requests, and simply
 4 demanded full compliance—yet again failing to meet its obligations under the rules. *See SEC v.*
 5 *Schooler*, No. 3:16-cv-00517-MMD-WGC, 2016 WL 6821079, at *5 (D. Nev. Nov. 17, 2016)
 6 (awarding sanctions where the party “draft[ed] an overly broad subpoena; ma[de] absolutely no
 7 effort to narrow the requested documents when confronted by objections and a charge of over
 8 breadth by opposing counsel; [but] then agreeing to narrow the requests when faced with a hearing
 9 on a motion to quash the subpoena and order to meet and confer.”).

10 Switch failed to comply with its obligations under Rule 26 in issuing the Subpoena and
 11 then dug in its position and refused to remedy it. As a result, its Motion to Compel should now be
 12 denied.

13 **C. Switch Has Failed to Show That It First Sought The Information It Needs From**
 14 **Defendants.**

15 To the extent that the Subpoena seeks information from JLL Inc. that Switch could have
 16 sought from Defendants, Switch’s Subpoena and Motion to Compel are also improper because
 17 Switch has made no showing that it has been unable obtain that information from Defendants.

18 Switch was first obligated to seek information from Defendants before issuing the Subpoena
 19 to JLL Inc. seeking that information. To the extent that Defendants objected to providing such
 20 discovery, Switch was not permitted to seek it from JLL Inc. instead:

21 If a party has served discovery requests on the opposing party to which the latter has
 22 objected, then the requesting party should (1) attempt to resolve the discovery dispute
 23 through the meet and confer process required by Rule 37(a)(1) and Local Rule 26-7(c), and
 24 if that is unsuccessful, (2) timely file a motion to compel production of the requested
 documents or information. In general, it is not proper to avoid the opposing party’s
 objections by requesting the same documents or information through another discovery
 device.

25 *McCall v. State Farm Mut. Auto. Ins. Co.*, No. 2:16-cv-01058-JAD-GWF, 2017 WL 3174914, at *6
 26 (D. Nev. July 26, 2017); *Hickman v. Mead*, No. 2:18-cv-00404-GMN-NJK, 2019 WL 3837784, at
 27 *2 (D. Nev. Aug. 14, 2019) (“The court also has an obligation to protect non-parties from being
 28

1 burdened with subpoenas for documents that can more easily and inexpensively be obtained from
2 the opposing party.”).

3 Switch cites *Diamond State Insurance Co. v. Rebel Oil Co.*, 157 F.R.D. 691, 697 (D. Nev.
4 1994) for the proposition that seeking duplicative discovery from JLL Inc. should be permitted
5 because “documents maintained in the files of each entity may not be identical.” But that case is
6 distinguishable because it involved litigation between an insurer (Diamond State) and a policy
7 holder where the subpoena sought documents from the insurance agent who directly negotiated the
8 terms of the policy at issue, and where there was evidence that the agent might have unique files
9 due to the “the manner in which underwriting guidelines have been filed.” *Id.* And, even then, in
10 order to “limit the unnecessary production of identical information by a non-party,” the court
11 required only production of documents that had not already been produced by Diamond State. *Id.*

12 Switch attempts to absolve itself of the requirement to avoid duplicative discovery by
13 protesting that “[d]iscovery from Defendants has proceeded slowly” and that the Court only
14 “recently” issued an Order to address that “discovery impasse” (this references, ECF No. 65, which
15 was issued over four months ago on November 19, 2019). Mot. at 6:10-12. Based on that, Switch
16 claims that it is “impossible to determine what documents Defendants have and will be able to
17 produce.” *Id.* at 14-15. Far from justifying the Subpoena, this only further confirms that the alleged
18 nexus of JLL to this matter remains purely speculative and that no evidence establishing such a
19 connection has emerged. Moreover, to the extent that the parties have pursued discovery “slowly,”
20 that should not open the door to take discovery from third parties, as presumably this delay could
21 only be due to either Switch’s own lack of action or its inability to overcome well-founded
22 objections by the Defendants.

23 **D. The Subpoena Seeks The Production of the Confidential and Trade Secret**
24 **Information of JLL and Its Customers to a Competitor Without Substantial**
25 **Need.**

26 Compounding its other flaws, it is clear that the Subpoena seeks competitively sensitive
27 confidential information and trade secrets. Switch does not have a substantial need to access that
28 information, and JLL Inc. should not have to produce it.

1 Where a subpoenaed party meets th[e] initial burden of showing the information is a trade
2 secret or confidential commercial information, ‘the burden shifts to the requesting party to show a
3 substantial need for the testimony or material that cannot be otherwise met without the undue
4 hardship.’” *Sci. Games Corp. v. AGS LLC*, No. 2:17-cv-00343-JAD-NJK, 2017 WL 3013251, at
5 *3-4 (D. Nev. July 13, 2017). A “substantial need” means that the “the requested discovery is
6 relevant and essential to a judicial determination of [the party’s] case.” *Id.* at *3 (citing *Upjohn Co.*
7 *v. Hygieia Biological Labs.*, 151 F.R.D. 355, 358 (E.D. Cal. 1993)). The Court must “balance the
8 need for the trade secrets [or confidential information] against the claim of injury resulting from
9 disclosure.” *Id.* Further, “[t]he determination of substantial need is particularly important in the
10 context of enforcing a subpoena when discovery of a trade secret or confidential commercial
11 information is sought from non-parties.” *Id.* (citing *Mattel, Inc. v. Walking Mountain Prods.*, 353
12 F.3d 792, 814 (9th Cir. 2003)); *see also Hickman v. Mead*, 2019 WL 3837784, at *2-3 (denying
13 motion to compel enforcement of subpoena where issue “fail[ed] to demonstrate” how third parties
14 confidential internal policies and procedures were relevant to claims).

15 Switch’s sweeping document requests, which seek “all communications” over nearly a
16 decade involving JLL Inc.’s customers and other third parties in the industry, squarely put the
17 confidential information and trade secrets of JLL Inc. and its customers at issue. Bauer Decl., ¶ 10.
18 Indeed, much of that information is confidential to multiple third parties and protected under non-
19 disclosure agreements. *Id.* Switch knows this, but quibbles that the requests “say nothing about
20 confidential information or trade secrets.” Mot. at 7:16-17. Of course, Switch could not truly
21 believe that in good faith; its Motion is littered with evidence that it is aware that Aligned/Inertech
22 are competitors and that eBay, PayPal, and Uber are existing or potential customers of both
23 companies or their clients. Clearly, Switch knows that communications among those entities are
24 competitively sensitive as to Switch. Bauer Decl., ¶ 10.

25 In some cases, concerns about confidential information and trade secrets in discovery can be
26 mitigated by the existence of a protective order. This is not the case here, where the Protective
27 Order (ECF No. 64) expressly allows Sam Castor, the Executive Vice President of Policy for
28 Switch to view all documents, even if they are designated “HIGHLY CONFIDENTIAL.” By Mr.

1 Castor's admission, he has wide-ranging responsibilities at Switch including the negotiation of
 2 "hundreds" of commercial contracts for the company. As such, disclosure of information to him
 3 means that a member of Switch's executive team involved in competitive decision making has full
 4 access to it.

5 Switch has failed to show that it has any basis to believe that discovery from JLL Inc. is
 6 proportional to the needs of the case, and it certainly has not met its burden to show that it has a
 7 substantial need for discovery of confidential and trade secret documents from JLL Inc. and other
 8 third parties. For these reasons, the Court should deny Switch's Motion.

9
 10 **E. Switch Improperly Designated The District Of Nevada As The Place Of
 Compliance on the Subpoena.**

11 Finally, Switch separately violated Rule 45 by designating Las Vegas, Nevada as the place
 12 for compliance with the subpoena, thereby making this the Court of enforcement for the Subpoena.

13 "The territorial scope of the court's subpoena power is only limited by Rule 45(c), which
 14 governs the place of compliance. Rule 45(c) limits where a subpoena may order compliance to
 15 protect a subpoenaed person by reducing the burden of complying with the subpoena." *NML*
 16 *Capital Ltd. v. Republic of Argentina*, No. 2:14-cv-492-RFB-VCF, 2014 WL 3898021, at *10 (D.
 17 Nev. Aug. 11, 2014) (citing *Regents of Univ. of Cal. v. Kohne*, 166 F.R.D. 463, 464 (S.D. Cal.
 18 1996) (citing Fed. R. Civ. P. 45 advisory committee's note—1991 amendment)). Accordingly,
 19 although a subpoena may be served anywhere in the world on a "national or resident of the United
 20 States," it may only compel compliance within the state or within 100 miles of where "the person
 21 resides, is employed, or regularly transacts business in person." *NML Capital*, 2014 WL 3898021,
 22 at *10 (citing Fed. R. Civ. P. 45(c)(1)).

23 Here, the Court should also deny the Motion to Compel based on Switch's improper
 24 designation of Las Vegas as the place of compliance. *See, e.g., USSC Holdings Corp. v. TK Prods.,*
 25 *LLC*, No. 3:16-cv-00398-RCJ-WGC, 2017 WL 7725266, at *2 (D. Nev. Jan. 26, 2017) (denying
 26 motion to compel enforcement of subpoena demanding documents in part because the place of
 27 compliance was improper). Switch subpoenaed JLL Inc. to produce documents in the District of
 28 Nevada, thus setting the place of compliance where JLL Inc. neither resides nor regularly transacts

business. Arnold Decl. ¶¶ 3-4. While Switch contends that JLL Inc. does business in Nevada, the only evidence it cites are the office locations of JLL Americas in Nevada. ECF No. 66-1 (Castor Decl. ¶ 6). This is insufficient to show that JLL Americas' parent JLL Inc. regularly transacts business, or resides, in the District of Nevada. It was thus improper for Switch to issue a Subpoena to JLL Inc. designating the place of compliance in Las Vegas.

IV. CONCLUSION

Multiple years into Switch's case against Defendants, it appears that it has yet to uncover any evidence substantiating its claims against Defendants and is now trying to misuse the discovery process to try to develop new claims against third parties and/or as a means to access competitively sensitive information for business purposes. When JLL Inc. confronted Switch with its objections on these grounds, Switch was unable to identify a proper basis for the Subpoena and also refused to consider narrowing it. For all the reasons discussed herein, the Subpoena plainly violates Rule 45 and 26 and the Motion to Compel should be DENIED.

Dated: April 9, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of the foregoing **JONES LANGE LASALLE, INC.'S OPPOSITION TO PLAINTIFF SWITCH, LTD.'S MOTION TO COMPEL THIRD PARTY JONES LANG LASALLE TO PROVIDE REQUESTED DOCUMENTS** via the Court's CM/ECF system on April 9, 2020.

/s/ William R. Urga
WILLIAM R. URGA